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No. 09-1494

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL KLEINMAN,
SCOTT WADE and JOHN TRAVIS,

Petitioners,

v.

CITY OF SAN MARCOS, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

The only true question presented is whether the standards set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) apply to this junked vehicle. When a city passes a regulation, such as a junked vehicle ordinance, which is not designed to regulate speech, such regulation need only be reasonable and no greater than necessary to accomplish its objective in order to comply with the First Amendment. The Petitioners designed the questions presented to this Court as ones not before the Fifth Circuit in an attempt to make the case appealing for review.

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JURISDICTION AND STANDING

Petitioners Kleinman, Wade, and Travis all seek review of the Fifth Circuit's ruling but challenge only the holdings under the First Amendment, not the Visual Artists Rights Act ("VARA"). 17 U.S.C. § 106A(a)(3). By stipulation and findings of the trial court, Petitioner Kleinman is the owner of the junked vehicle at issue. Pet. Writ of Cert. App. 60 (Stip. 15). Petitioners Wade and Travis, as the artists commissioned by Kleinman, have no ownership or interest in the junked vehicle and therefore have no standing under the First Amendment. Wade and Travis only had standing under VARA, which they are not pursuing in this Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Fifth Circuit specifically held "Irrespective of the intentions of its creators or Planet K's owner, the car-planter is a utilitarian device, an advertisement, and ultimately a 'junked vehicle.' These qualities objectively dominate any expressive component of its exterior painting . . . When the 'expressive' component of an object, considered objectively in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation." *Kleinman v. City of San Marcos*, 597 F.3d 323, 327 (5th Cir. 2010).

In *United States v. O'Brien*, 391 U.S. 367 (1968) this Court held that when "speech" and "non-speech"

elements are united in a course of conduct, a valid governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. *Id.* at 376, 88 S.Ct. at 1678-79. The object in question in this case is a junked vehicle. The Petitioners stipulated it was a junked vehicle under the definition of the ordinance. Pet. Writ of Cert. App. 60 (Stip. 14). It was a junked vehicle prior to any "artistic" alterations and it remains a junked vehicle with the same health and safety concerns. Whether the object has no painted images, graffiti painted on it, the Mona Lisa or "vote me for Mayor," such images are irrelevant to the enforcement of the City's health and safety concerns. The Petitioners were advised prior to any alterations that the City considered it a junked vehicle and needed to be removed; yet the Petitioners believed their car was exempt from *all* regulations in the name of the First Amendment.

The trial court made specific factual findings which the Fifth Circuit held were supported in the record. Planet K, Petitioner Kleinman's business, utilizes painted cars with cacti planted as part of its corporate image. The junked car in this case is a corporate icon. However, while it is also an advertisement, it still remains a junked vehicle. As a result, the First Amendment protection to such an object is not the same as the protection offered to religious or political speech. The trial court also determined the Petitioner had ample alternatives to display the object to the public, including fencing it off, enclosing it,

and placing it in a garage and inviting the public to view, or photographing it and displaying it on a billboard. Under the *O'Brien* test, the City's regulation, which mirrors the State of Texas junked vehicle regulation, is a reasonable, content-neutral regulation which does not violate Petitioners' First Amendment rights.

The Fifth Circuit's reference to *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 569 (1995) was not a determination that only great works of art are entitled to First Amendment protection. All that the opinion states is that *Hurley* did not address the standard other than its generalized references to protecting great works of art. A straight forward reading of the Court of Appeals opinion makes it clear the opinion does not say what Petitioners claim. The Fifth Circuit references *Hurley* and observes that it cites regulations aimed at expressive activities. *Hurley* was not a case, as was *O'Brien*, where the regulation was not directed at speech at all and the impact on expression was incidental to an otherwise legitimate governmental purpose. The City's junked vehicle ordinance is not aimed at regulating speech at all but at abating health and safety concerns. The Petitioners and Amici mischaracterize the Fifth Circuit's ruling in an attempt to make it attractive for this Court to hear the case. However, the specter of subjective determinations of "great works of art" by the court has nothing to do with the holding. Under *O'Brien*, the City's junked

vehicle ordinance does not violate the First Amendment.

ARGUMENT

I. First Amendment Does Not Exempt Junked Vehicles from Reasonable Regulations.

The City of San Marcos Code of Ordinances, Chapter 34, regarding junked vehicles is not directed in any way, shape, or form at regulating expression and an effect on expression was not even contemplated in its creation. Pet. Writ of Cert. App. 20-21, 29. The City's junked vehicle regulations are aimed very clearly at reducing blight, addressing health and safety issues such as preventing the harboring of vermin, rodents, and other animals which potentially pose health risks, avoiding reductions in property values, preventing fire hazards, and avoiding attractive nuisances for children. Pet. Writ of Cert. App. 25. Judge Sparks specifically held as such which the Fifth Circuit affirmed based on the record.

Specific factual findings determined by Judge Sparks and supported in the record include the fact the City has been battling problems with junked vehicles for years; over 1300 within a two year period prior to suit. Specific instances included some cases where children were using the vehicles as forts and at least one case where a child became locked inside an abandoned vehicle. Pet. Writ of Cert. App. 25.

The trial court found "[j]unked vehicles are an attractive nuisance to children. Rodents, pests, and weeds thrive in and around them." Pet. Writ of Cert. App. 11-12. The municipal court and U.S. District Court held the ordinance also tends to reduce urban blight, vandalism, and the depressing effect of junked vehicles on property values. "Petitioners' insistence that the car-planter has been rendered safe is immaterial to the constitutionality of the ordinance. The City's right to regulate junked vehicles, not the individual status of each vehicle, is the concern of First Amendment inquiry." *Kleinman v. City of San Marcos*, 597 F.3d 323, 328 (5th Cir. 2010) (citing to *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430 (1990)); Pet. Writ of Cert. App. 12.

Judge Sparks additionally and explicitly found that while "Plaintiffs allege the car planter's 'dominant purpose' is expressive . . . it is not a 'pure statement' of Plaintiffs' beliefs about car culture, but is also both a planter and a distinctive symbol of the Planet K business . . . [t]he 'artcars' are a part of Planet K's corporate culture and public image. . . . [a petition by customers] expressly links the car planter to Planet K's corporate history." Finally, the "car planters are closely associated with Planet K" and is a corporate icon. Pet. Writ of Cert. App. 27-28. As a result, the desire by the Petitioners to have this junked vehicle and public nuisance visible from the street in front of the Planet K store has more to do

with their business model than with a desire to bring art to the public.

Numerous legitimate, important, and substantial governmental interests exist to support the City's junked vehicle regulation, which mirrors the State of Texas' junked vehicle statute. Tex. Transp. Code Chapter 683, Subchapter E. As a result, whether the junked vehicle is simply sitting by itself because the owner does not desire to move it, used to house graffiti, used as a corporate sign, used as a canvas for artwork, or used as a symbolic message, the legitimate purposes behind the ordinance should allow reasonable regulations to protect public health and welfare. Even though the City's health and safety regulations may have an incidental effect on the use of such an object for expression, the restriction is no more than necessary and the Petitioners still have adequate ample alternatives to express whatever message they desire.

This Court held in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), that "freedom of expression" does not include all modes of communication of ideas. *Id.* O'Brien was found guilty of burning his Selective Service registration certificates on the steps of the South Boston Courthouse. He argued this act was symbolic speech and protected by the First Amendment. The Court found that the government may regulate aspects not aimed at communication as long as the governmental interests are important and the regulation is aimed at achieving its goals.

The *O'Brien* Court held:

> (W)hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . (A) government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest. . . .

United States v. O'Brien, 391 U.S. at 376-77.

This Court examined in another type of First Amendment case in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), laws of general applicability which incidentally burden First Amendment rights are not subject to the narrowly tailored or compelling interest standards, but are subject merely to a rational basis review. This type of test has been adopted for junked vehicle ordinances in other Circuits. The Eighth Circuit, in *Davis v. Norman*, 555 F.2d 189 (8th Cir. 1977), utilized the *O'Brien* test in upholding a junked vehicle ordinance. In *Davis*, the City of Pine Bluff attempted to enforce its junked vehicle ordinance against Davis, who displayed a wrecked vehicle in which his son was killed during a high-speed police

chase, in his front yard as a symbolic political protest against abuse of police authority.

The Eighth Circuit, after quoting the *O'Brien* standards, held that:

> The ordinance serves the basic purpose of protecting the community from the health and safety hazards created by abandoned, wrecked and inoperable vehicle. The effectuation of this objective by requiring enclosed storage is within the constitutional power of the city and furthers important and substantial government interests. Also the furtherance of these interests is unrelated to the suppression of free expression. Both the governmental interest and operation of the ordinance are limited to the noncommunicative aspect of Davis' conduct.

Id. at 191.

The Petitioners attempt to distinguish *Davis* by asserting Davis "did nothing to transform the wreck into a genuine expressive work of art" Pet. Writ of Cert. 2, fn. 4. Apparently, Petitioners believe that artistic expression should have more First Amendment protection than the political/symbolic speech at issue in *Davis*. Political speech is one of the highest categories of protection under the First Amendment yet it was still subject to reasonable regulation in *Davis*. The issue is not the type of speech, but the type of regulation. Junked vehicles, as a category, pose numerous health, safety, and other problems for citizens. Regulations of junked vehicles are not

geared nor intended to have any impact on expression.

In truth, any object or item can be utilized as a medium to express a view. Citizens cannot exempt objects of health and safety regulations simply by utilizing them in expressive ways. Imagine if an individual wished to protest a City's solid waste contract and utilized garbage (discarded food, waste, plastic, etc.) in his front yard to spell out a political message; or if he used it to create a compost sculpture out of artistic motivation. The use of such a medium can cause rodents, vermin, and disease issues, is unsightly, and can affect property values.

An ordinance which requires all trash to be bagged, placed in approved trash containers and not placed in the front yard (only on the curb) unless it is trash pickup day is a reasonable regulation not aimed at suppressing speech. Cities have no interest in what message is expressed utilizing garbage as a medium (if they even contemplate expression using the medium) they just want to avoid the negative community consequences of the use of garbage for anything other than a landfill. Requiring such regulations to withstand strict or even intermediate scrutiny under the First Amendment (when the regulations do not even contemplate any regulation of speech) can result in obstructive results. The *O'Brien* factors properly balance the interests and allow for the proper result.

When the expressive component of an object subject to a general regulation (which was not aimed

at regulating speech) is secondary to its primary function, the object is subject to reasonable regulations without offending the First Amendment. Such regulation is permissible even if it has an incidental effect on expression. Judge Sparks made the specific factual finding that artistic expression was not the dominant element of the junked vehicle. Whether the secondary expressive component is political, artistic, graffiti or a great work of art is irrelevant.

Health and safety regulations, such as a garbage ordinance or junked vehicle ordinance, are not written to regulate speech at all. They are therefore not designed to be interpreted under First Amendment tests and such tests should not be applied to them in the traditional sense. Unlike *Hurley* and *Bery v. City of New York,* 97 F.3d 689 (2nd Cir. 1996) (cited by Petitioners), which involved laws aimed at regulating areas of expression, *O'Brien*, *Davis*, and the City of San Marcos all utilize ordinances which have nothing to do with the regulation of expression. San Marcos is regulating nuisances and health and safety concerns. It does not care what is painted on the junked vehicle, if anything. It regulates all junked vehicles the same since they all have the same health and safety concerns. Painting the junked vehicle does not eliminate the concerns; neither does the Petitioner's contention that their particular vehicle is safe. Since *any* object can theoretically be utilized as a medium for expression, requiring all regulatory ordinances to withstand First Amendment challenges goes against the precedent set forth by this Court in *O'Brien*. The First

Amendment does not exempt junked vehicles from regulation.

II. Alternate Motives and Avenues of Expression

Planet K is attempting to utilize the First Amendment to protect a corporate symbol which augments its advertising. It wants to keep the junked vehicle exactly as it is and visible to travelers on the roadway for business purposes. As argued above, the junked vehicle is not subject to the same type of First Amendment analysis articulated in *Hurley* or *Bery*; *O'Brien* and *Davis* control.

However, to the extent Petitioner Kleinman desires to display the artistic component of the junked vehicle, he can still do so. Numerous alternative avenues of expression exists which still allow the City to address its health and safety concerns.

A photo or display of the junked vehicle can convey the same message. The junked vehicle can be displayed in a building, tent, or other area and can be open to the public for display. Judge Sparks specifically held "the Court finds an enclosed space, open to the public, on the Planet K lot is an adequate alternative channel of expression." Pet. Writ of Cert. App. 30-31. The Petitioners do not enjoy a constitutional right to every method of display they desire or unrestricted access to a specific audience (i.e. drivers along IH-35). The Fifth Circuit, after examining

the record, determined these findings were not clearly erroneous and were supported.

Petitioner Kleinman does not want the junked vehicle shielded from the public right-of-ways as that reduces its commercial application – which is his true underlying intent and purpose. His proposition is that by labeling his corporate icon as "art" he should be exempt from sign regulations, exempt from placement regulations, and exempt from health and safety regulations. However, the intricate individual paintings on the car/planter cannot be seen from the expressway. Pet. Writ of Cert. App. 31-32. The only way an individual can see the images is to be up close to it, in person. The iconic image of a smashed vehicle with bright colors and cacti growing out of it, however, can be seen from the roadway and lets travelers know there is a Planet K nearby. Pet. Writ of Cert. App. 31-32.

Under *O'Brien* and *Davis*, the Fifth Circuit need not have addressed the alternative channels of expression prong. However, it still went through the analysis out of an abundance of caution. Judge Sparks specifically found "[e]nclosing the car planter does not cut off public access to the car planter . . . [the City's ordinance] leaves open ample opportunity to display the car planter to patrons of Planet K and any other individual who cares to come inside the screening structure to look at it . . . the requirement that the car be enclosed does not prevent Plaintiffs from advertising the existence of the car planter to

passersby and inviting the general public to come in and view the piece." Pet. Writ of Cert. App. 30-31.

Judge Sparks also specifically noted:

> Of course, enclosing the car planter means the only people who will receive its message are those who accept this invitation. Plaintiffs will not be able to display the car planter to the drivers passing on Interstate 35, whom Plaintiffs contend are a crucial part of their audience. The Court finds, however, that although these drivers may be part of the audience Plaintiffs wish to reach, the medium of the junked car cannot plausibly be considered an essential part of the expressive content Plaintiffs wish to convey to this group. Dr. Bedmar conceded on cross examination that a driver passing on Interstate 35 would likely be unaware of the car planter's nature as a "junked car," and would see only a brightly painted car with some plants growing in it. To the extent "the medium is the message" in this case, the only audience who receives the unique message of the junked car consists of those who are close enough to see the fact that the car planter is a destroyed automobile. These are people who have already elected to come onto the Planet K lot.

Pet. Writ of Cert. App. 31-32

If this Court wishes to examine the junked vehicle ordinance as a reasonable time, place, and manner restriction, the ordinance still passes muster.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) this Court set forth the standards when dealing with the proper balance of a regulatory ordinance and its impact on the First Amendment.

The Court in *Ward* specifically held that:

> So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted.

Id. at 800 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Unlike this case, or *O'Brien* and *Davis*, the ordinance in *Ward* was one which did regulate expressive activity. To the extent a junked vehicle ordinance can be analyzed as a valid time, place or manner restriction on First Amendment expression, the City's regulation is still legitimate. The prohibitions on junked vehicles are directly tied to significant and important governmental interests. The restriction of the display of the nuisance only from the public right-of-ways is sufficiently narrow enough

to address the City's concerns yet still leaving open ample alternative channels. Judge Sparks made specific factual determinations that Petitioners have alternative channels sufficient to allow whatever message the Petitioners desire to express. Petitioners had the right to still leave the vehicle on-site but to shield it from view or invite individuals into an enclosed structure. There is no risk that this standard, devised to deal with junk and nuisances, will open some floodgates of speech regulation when any ordinance directed at speech must meet a more strenuous standard. No threat to great art, or even average art, is presented.

Regardless of what images are painted on the junked vehicle, it remains a junked vehicle with the same health and safety concerns as any other junked vehicle. As such, it is subject to the City's reasonable regulations. Petitioner Kleinman does not want it screened from the roadway as that restriction reduces the promotional advertising effect. The reduction, however, does not mean that acceptable and constitutional alternative channels are foreclosed. They exist. He is simply not happy with them.

III. Standing

Petitioner Kleinman is the only party who actually has standing to petition this Court to review the claims asserted. The general rule is that "a litigant may only assert his own constitutional rights or

immunities." *United States v. Raines*, 362 U.S. 17, 22 (1960).

By stipulation, Petitioner Kleinman is the owner of the junked vehicle at issue in this case. Pet. Writ of Cert. App. 60 (Stip. 15). Petitioners Wade and Travis do not own or have a legal interest in the junked vehicle made the subject of this dispute. Their own standing came from VARA which they did not pursue in their Petition. As a result, they have no standing under the First Amendment. Constitutional rights are personal and may not be asserted vicariously. *See McGowan v. Maryland*, 366 U.S. 420, 429-430 (1961).

CONCLUSION

The City of San Marcos' junked vehicle ordinance is not designed to regulate expression but to address numerous nuisance and health and safety concerns. Those concerns exist regardless of what, if anything, is painted on the vehicle. Under the *O'Brien* factors, the City has numerous legitimate governmental interests in prohibiting junked vehicles, the regulation is not aimed at regulating speech, and it no more restrictive than necessary to accomplish its goals. As a result, it does not offend the First Amendment. The Petitioners' out of context assertion that the Fifth Circuit somehow held that the First Amendment only applies to great works of art is not only false but is nothing more than an attempt to distract this Court into agreeing to hear this case when such

consideration is not necessary. A straightforward reading of the Fifth Circuit's opinion reveals it stands for no such proposition.

O'Brien and *Davis* control. As such, the City's junked vehicle ordinance is constitutional under well settled First Amendment jurisprudence. To the extent *O'Brien* does not control, the City's ordinance is still valid under *Ward*. The Fifth Circuit did not deviate from any constitutional standards and its opinion should remain intact. This Court should deny the Petitioners' Writ for Certiorari in its entirety.

Respectfully submitted,

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